

OPINION
44-51

March 27, 1944 (OPINION)

ELECTIONS

RE: Soldiers Votes

Your letter of March 27th addressed to the Attorney General has been received and contents of same have been noted.

You state that the Legislature is contemplating legislation which permits absent voters ballots to be voted overseas and mailed back to the election officials in this state. Assuming that this is done, and further assuming that such ballots would be opened for censorship purposes, could the election officials count such ballots or would it be a violation or secrecy of the ballot to permit their use?

The first question presented here is whether or not the opening of an absent voters ballot by government officials for the purpose of censorship, would be in violation of Section 129 of the Constitution of the State of North Dakota which provides:

"All elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law."

We have made a somewhat thorough search of authorities and judicial decisions on the question of secrecy of the ballot. It is generally held that in order to safeguard the purity of elections, State Constitutions provide that the secrecy of voting shall be preserved and it has been held many times that a constitutional provision that voting shall be by ballot, implies an environment of secrecy. Similar laws have been enacted in many of the states to secure and preserve the secrecy of the ballot. These laws have generally been sustained by the courts.

The general rule requires voting by secret ballot, although exceptions have been made in cases of persons who are illiterate, blind, or otherwise disabled, and our state laws have recognized this and have enacted statutes to that effect. It has further been held that while a constitutional provision for secrecy in voting is mandatory, statutes designed to effectuate the purpose of secrecy are merely directory in prescribing means and methods to secure such end. However, courts have held that the right to secrecy is a personal privilege of the voter open to waiver, and that in the absence of absolute statutory provision to the contrary, the voter may waive his constitutional right to cast his ballot in secrecy.

In case of Board v. Dill (Oklahoma) 110 Pac. 1107, 29 LRA (NS) 1170, it was held:

"The primary purpose and object of the Australian ballot election law is to secure the independence of the elector by requiring of him the exercise of his right of franchise in absolute secrecy, and statutes, mandatory in their character, designed to accomplish this end, are mandatory on both the officials and the electors."

In the case of Hooper v. McNaughton, 214 Pac. 618, it was held that:

"While provisions of election statutes requiring secrecy are highly important and should be observed, they are not mandatory in the strict sense and the question of whether an exposed ballot should be counted will depend on the circumstances attending the exposure."

In a case considering the right of an elector to waive the privilege of secrecy, the court pointed out that a voter does not waive his constitutional right to secret ballot, unless he has knowledge of his rights and of surrounding facts enabling him to protect himself, and that it must be shown under the facts of the case that he had such knowledge.

Withers v. Board of Commissioners. 146 S.E.225.

In our search of authorities upon the question of secrecy we have found no decision directly in point. However, we believe that the following conclusions are supported by judicial authority.

1. If a soldier serving overseas votes by absent voters ballot in the presence of duly authorized officers, and verifies same before such authorized officers, seals it and places it in the mail, and it is found by the election officers that the same has been opened subsequent to voting, verification and mailing; then it is our opinion that the secrecy of such ballot has been violated.
2. If a soldier serving overseas has voted the absent voters ballot in the presence of a duly authorized officer and has verified the same before such officer and placed the same in the mail and if the envelope containing such ballot, when received by the election officers bears a stamp "Passed by Censor" but bears no evidence of having been opened, it is our opinion that the secrecy of such ballot has not been violated.

ALVIN C. STRUTZ
Attorney General